

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

76-7376

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-7376

BLANCHE MITCHELL,

Plaintiff-Appellant,

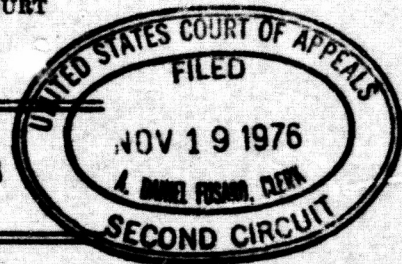
—against—

NATIONAL BROADCASTING COMPANY, and S. THEODORE
NYGREEN, Manager of Information Services, National
Broadcasting Company,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-7376

BLANCHE MITCHELL,

Plaintiff-Appellant,

-against-

NATIONAL BROADCASTING COMPANY,
and S. THEODORE NYGREEN,
Manager of Information Services,
National Broadcasting Company,

Defendants-Appellees.

On Appeal From The United States District Court For The
Southern District Of New York

BRIEF FOR DEFENDANTS-APPELLEES

Issue Presented

Whether the on-the-merits adjudication and dismissal
of plaintiff's employment discrimination claim by state adminis-
trative and judicial tribunals bars the relitigation of that
claim under 42 U.S.C. §1981?

Statement of the Case

This is an action in which the plaintiff, Blanche Mitchell, asserts that she was discharged from her employment by defendant National Broadcasting Company, Inc. ("NBC") on account of her race and color. The claim asserted is advanced solely under and pursuant to 42 U.S.C. §1981.

On this appeal, plaintiff seeks reversal of an order entered by the Hon. Charles M. Metzner, of the United States District Court for the Southern District of New York, granting defendants' motion (which relied solely upon official documents relating to the prior administrative and judicial proceedings conducted at plaintiff's initiative) for dismissal of the complaint and for summary judgment.

Based upon undisputed facts, the court below concluded that plaintiff Mitchell, whose claim had been adjudicated and dismissed on the merits by the New York State Division of Human Rights, the New York State Human Rights Appeal Board, and the Appellate Division, First Department, of the New York State Supreme Court, and who, during the course of such prior proceedings, had been afforded "a full and fair opportunity to present her case and. . . to seek court review of any adverse findings," was barred from relitigating her claim under 42 U.S.C. §1981.*

* Judge Metzner's opinion is reported at 418 F. Supp. 462 (S.D.N.Y. 1976), and a copy thereof is included in the Appendix at pp. 91a-96a. The portion quoted in the text appears at 418 F. Supp. at 464 and at p. 96a of the Appendix. Subsequent references to the Appendix shall be to the page number(s) thereof followed by the letter "a."

Statement of Facts

Plaintiff's Employment at NBC

Blanche Mitchell was employed by NBC on or about March 13, 1972 as an Operations Administrator. The Department in which she worked had a staff of thirteen employees, four of whom were Black (18a).

Although it was initially hoped that Ms. Mitchell would become qualified to succeed to a higher position and replace another employee contemplating retirement, plaintiff's performance failed to meet the standards that had been expected of her (16a-17a). Ms. Mitchell not only failed to perform effectively, but she was also insubordinate, uncooperative, and hostile, displaying an inability or unwillingness to work with others. Despite counselling and warning, her work deficiencies and poor attitude continued, and, on or about October 17, 1973, Ms. Mitchell was placed on probation for 30 days. During this probationary period, her conduct was at least as, if not more disruptive than previously (16a-17a, 18a). On or about November 19, 1973, Ms. Mitchell was discharged from her employment with NBC (14a ¶3).

The Proceedings Before the New York State Division of Human Rights

On or about December 4, 1973, plaintiff filed a complaint with the New York State Division of Human Rights

in which defendants NBC and Nygreen (as well as other NBC employees) were named as respondents. In that complaint, Ms. Mitchell charged the respondents "with an unlawful discriminatory practice relating to employment. . . by denying me equal terms, conditions and privileges of employment and terminating me. . ." because of race and color.* Similar to the complaint filed in the Court below, the allegations of the State Division complaint make clear plaintiff's claim that defendant Nygreen was the principal motivating force behind her discharge (14a ¶¶2-3).

The New York State Division of Human Rights is an administrative agency vested by statute with plenary adjudicatory powers similar to those of the National Labor Relations Board, the Federal Trade Commission, and other state and federal agencies. Section 297(2) of the New York Human Rights Law (N.Y. Executive Law, Article 15 (McKinney 1972)) provides that upon the filing of a complaint, the State Division shall conduct a prompt investigation and determine whether there is "probable cause" to believe that the respondents have committed an unlawful discriminatory practice. Alternatively, or in addition, the State Division may attempt to conciliate the matter at any time following the filing of a complaint. §297(3).

Should the Division find probable cause -- should it determine, in other words, that the complaint may have

* A copy of the State Division complaint is set forth at 14a.

some merit, or is at least not frivolous -- the Division must direct a public hearing before a hearing examiner. If, after hearing, the respondents are found to have engaged in any discriminatory conduct, the State Division is empowered to order them to cease and desist and to remedy such misconduct by, inter alia, directing the reinstatement of an employee, with or without back pay, and awarding damages. N.Y. Human Rights Law §297 (4)(a) and (c).

If the State Division finds no probable cause to believe that the respondents have engaged in discriminatory conduct - if, as occurred with respect to Ms. Mitchell's allegations, it concludes, in effect, that the claims are without merit (16a-17a) - then the Division is empowered to dismiss the complaint. N.Y. Human Rights Law §297(2).

In the present case, the State Division conducted an investigation which, the court below found, afforded plaintiff "a full and fair opportunity to present her case." (96a) During the investigation the parties had the opportunity to submit documentary materials, and Ms. Mitchell had the right to request the issuance of subpoenas compelling the attendance of witnesses and the production of documents.* The investigation

* The State Division's regulations provide for the issuance of subpoenas and subpoenas duces tecum at the Division's own instance or "at the instance of any party who appears without attorney...." Such subpoenas may be issued "at any stage of any investigation or proceeding pending before the Division...." Rules of Practice and Procedure of the Division of Human Rights §465.10, 3 CCH Employment Practices Guide ¶26,085.

also included two conferences before officials of the Division. At these conferences, which were attended by Ms. Mitchell and representatives of NBC (including defendant Nygreen), the parties were given the opportunity to - and did - give oral testimony and argue their versions of the facts.*

On February 11, 1974, the State Division issued a Determination and Order After Investigation, which, after reciting Ms. Mitchell's claim that she had been denied equal terms, conditions, and privileges of employment because of her race and color, provided in pertinent part as follows:

"After investigation, the Division of Human Rights has determined that there is no probable cause to believe that the respondents have engaged or are engaging in the unlawful discriminatory practice complained of.

"The respondents submitted documentation that controverted substantively the allegations in the complaint.

. . .

"The documentation included correspondence which depicted a difficulty of the complainant to adjust to the regimens of the position complained about.

. . .

"The documentation compiled and the oral testimony taken indicate that the complainant was dismissed for reasons other than those complained about."**

* See 16a-17a, 18a, 28a 114(a) and (b).

** A copy of the Determination and Order After Investigation is set forth at 16a-17a.

In effect, the State Division granted summary judgment dismissing Ms. Mitchell's complaint, thereby disposing of an allegation of discrimination it considered to be without merit.

The Proceedings Before the New York
State Human Rights Appeal Board

The Determination and Order After Investigation notified plaintiff of her right to appeal the Division's decision to the New York State Human Rights Appeal Board (17a) and, on or about February 12, 1974, Ms. Mitchell filed a notice of such appeal (36a).

The Human Rights Appeal Board is an adjudicatory authority within the Executive Department, separate and independent from the State Division. Its members, who are appointed by the Governor with the advice and consent of the New York State Senate, are required to be attorneys. N.Y. Human Rights Law §297-a(1) and (5).

The Board is charged with the duty of hearing appeals from all orders of the Division, and, in connection therewith, is empowered to require submission of the entire record made before the Division, and to receive briefs and hear oral argument. N.Y. Human Rights Law §297-a(6)(c), (d), and (e). The Board "may affirm, remand or reverse any order of the division or remand the matter to the division for fur-

ther proceedings. . .," and its decisions are binding upon the Division except to the extent that they may be reversed or modified by the Appellate Division of the Supreme Court. N.Y. Human Rights Law §297-a(7).

On March 27, 1974, plaintiff was accorded another opportunity to argue her version of the facts, when the Appeal Board heard oral argument. Following the argument and after its review of the record, the Board, on July 24, 1974, issued an order affirming in all respects the Determination and Order of the State Division (40a).

The Proceedings Before the Appellate
Division, First Department, of the
Supreme Court of the State of New York

On or about August 26, 1974, attorneys for Ms. Mitchell petitioned the Appellate Division, First Department, pursuant to both Article 78 of the N.Y. CPLR (McKinney 1963) and Section 298 of the Human Rights Law, for a judgment setting aside the Appeal Board's order and, inter alia, compelling the respondents (who included both defendants NBC and Nygreen) to reinstate petitioner and award her back pay (26a-31a).

A judgment issued under Article 78 of the CPLR may grant the relief to which a petitioner is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the Article 78 proceeding is brought to review a determination of a body or officer, the judgment may annul or

confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. CPLR §7806. If, in an Article 78 proceeding before the Appellate Division, "a triable issue of fact is raised," such issue is tried by a referee or by the Supreme Court, with any decision returned to and made an order of the Appellate Division. CPLR §7804(h).

Under Section 298 of the Human Rights Law, a petition to review an order of the Human Rights Appeal Board is to be accompanied by a written record of all prior proceedings (furnished by the State Division without cost), and the Appellate Division is empowered to enforce, modify, or set aside in whole or in part the order appealed from. In addition, Section 298 contains a provision which affords a party to a proceeding under the Human Rights Law the right, at the appellate level, to move to cure an inadequate record.

It provides:

"Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he shows reasonable grounds for the failure to adduce such evidence in prior proceedings."

In her petition to the Appellate Division, and in addition (or as an alternative) to a request that she be reinstated in NBC's employ, plaintiff Mitchell sought exercise

of the right conferred by Section 298. Critizing the State Division for the procedures it had followed, Ms. Mitchell asked that the proceeding be remanded to the Division for further investigation (29a-30a ¶¶6-10, 31a).

On November 7, 1974, following its receipt of an answer to the petition filed on behalf of defendants NBC and Nygreen (and others), and after hearing counsel for both Ms. Mitchell and NBC, the Appellate Division "unanimously ordered that the determination of the State Human Rights Appeal Board" be confirmed (48a-49a).

Plaintiff Mitchell sought no further relief in the courts of New York State, although the order of the Appellate Division was subject to review by the New York Court of Appeals. N.Y. Human Rights Law §298.*

* On February 27, 1974, while the state proceedings were pending, Ms. Mitchell filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in which she contended that she had been discharged because she was Black. On February 14, 1975, the EEOC issued a determination that there was no probable cause to believe that discrimination had occurred, and, accordingly, dismissed the complaint (50a-51a).

SUMMARY OF ARGUMENT

This is an action in which plaintiff seeks to relitigate a claim already adjudicated and dismissed on the merits in state administrative and judicial proceedings. During such proceedings, plaintiff had and exercised the right to adduce evidence, to argue her version of the facts, and to seek court review of adverse findings. Accordingly, further prosecution of such claim is, as the District Court held, barred by principles of res judicata.

On this appeal, plaintiff tenders no compelling reason for departure from traditional res judicata principles, which have been designed to protect both litigants and courts from the burdens, expense, and harassment of repetitive litigation.

As we show in Point I, the federal courts have customarily accorded res judicata effect to the determinations of state tribunals, so long as the subsequent federal suit seeks relief for the same alleged wrong that was the subject of the state proceedings. In this case, the gravamen of plaintiff's claim is and has always been that she was wrongfully discharged by defendant NBC, and this claim was passed upon and rejected on the merits not only by the State Division and the Human Rights Appeal Board, but also by the Appellate Division, First Department. Plaintiff

cites no case in which an on-the-merits state judicial determination, even in the employment discrimination area, has been denied preclusionary effect.

Plaintiff places great reliance on certain Title VII decisions suggesting that the results of state administrative proceedings, pursued in compliance with the so-called "deferral" provisions of Title VII, may not be used to bar a subsequent Title VII suit in federal court. This is not, however, a Title VII action; it has been brought solely under and pursuant to 42 U.S.C. §1981. Accordingly, as Point II explains, the considerations underlying the approach to res judicata in a Title VII context are, as Judge Metzner found, entirely inapplicable here. Moreover, plaintiff's argument ignores cases, brought under §1981 and other provisions of the Civil Rights Acts, in which the federal courts have not hesitated to apply the doctrine of res judicata.

Also in Point II, we show the lack of merit in plaintiff's contention that the decision below is contrary to some alleged congressional preference for the resolution of discrimination claims via conciliation. While this may be so under Title VII, there is no provision for conciliation under §1981, and the Supreme Court has, indeed, made clear that a litigant is free to choose between the two, independent statutory schemes.

Similarly without merit is plaintiff's speculation that affirmance would lead to the proliferation of \$1981 lawsuits and thus run counter to general principles of economy. Res judicata is, we submit, the very essence of judicial economy.

Finally, in Point III, we deal with the claim that application of res judicata would be inequitable in the circumstances of this case. As we have already noted, and as the District Court found, plaintiff had a full and fair opportunity to present her case during the course of the state proceedings. Her claim was adjudicated by an administrative agency particularly expert in (indeed, created for the purpose of) resolving discrimination claims; and that judgment was reviewed and confirmed on the merits by five Justices of New York's intermediate appellate court. Further, and in any event, plaintiff's assertion regarding the alleged inadequacy of the state procedure was itself raised and resolved against her in the state proceedings.

In sum, plaintiff's claim has been fully adjudicated, and no unfairness or injustice would result if she were barred from pursuing the matter further. Sanctioning the relitigation she seeks would, however, inflict substantial prejudice upon defendants NBC and Nygreen by exposing them to the burdens, expense, and harassment of repetitive litigation -- the prejudice that the res judicata doctrine is specifically designed to prevent.

ARGUMENT

I

THIS ACTION IS BARRED BY THE RES JUDICATA EFFECT OF THE PRIOR AND FINAL ADMINISTRATIVE AND JUDICIAL DETERMINATIONS OF THE CLAIM ASSERTED HEREIN

In this case, plaintiff seeks to assert a cause of action that, as a result of proceedings she herself initiated and pursued, already has been adjudicated on the merits and dismissed as frivolous by the administrative and judicial agencies invested by the State of New York with the authority to adjudicate such matters. Such an attempt at relitigating this claim should be rejected, under the doctrine of res judicata, in order to avoid a wasteful duplication of legal proceedings and the harassment of defendants NBC and Nygreen by the multiple assertion of identical claims.

To protect litigants from the burden and expense of repetitive and unnecessary litigation, courts have long recognized the doctrines of res judicata and collateral estoppel:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken

as conclusively established, so long as the judgment in the first suit remains unmodified." Southern Pacific Railroad Company v. United States, 168 U.S. 1, 48-49 (1897).

In the present case, there can be no dispute that the "right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction" [i.e., the Appellate Division] was the same right, question or fact that plaintiff sought to re-litigate in the Court below. In the state proceedings and in this suit under 42 U.S.C. §1981, plaintiff Mitchell seeks relief for the same alleged wrong.

Moreover, it makes no difference whether the state determination for which res judicata effect is sought is regarded as a court decree into which the prior administrative proceedings and decisions were merged,* or as an administrative determination. It is clear, as the District Court noted (16a), that the doctrines of res judicata and collateral estoppel attach to the final determination of administrative agencies, as well as courts:

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Construction and Mining Company, 384 U.S. 394, 422 (1966).

* See Mine Workers v. Eagle-Picher Co., 325 U.S. 335, 339 (1945).

The result, said the Court, "avoids 'a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end.'" 384 U.S. at 420.

Federal courts, of course, apply the principal of res judicata to the determinations of state adjudicatory bodies. See, e.g., Morris v. Jones, 329 U.S. 545 (1947); Davis v. Davis, 305 U.S. 32 (1938). Res judicata effect is given to a state court decision whenever the "primary right and duty, and the delict right or wrong" are the same in the state and federal court actions. Seaboard Coast Line Railroad Company v. Gulf Oil Corporation, 409 F.2d 879, 881 (5th Cir. 1969). Thus, it has been held, the fact that state and federal proceedings were based upon different statutory predicates or legal theories does not bar the application of the doctrine of res judicata where the two proceedings involved the same alleged breach of duty. William E. Goetz & Sons v. Board of Regents, State Senior Colleges, 465 F.2d 432 (5th Cir. 1972), appeal dismissed, 409 U.S. 1121 (1973); Pan American Match Inc. v. Sears, Roebuck and Co., 454 F.2d 871 (1st Cir.) cert. denied, 409 U.S. 892 (1972); Fowler Manufacturing Company v. Gorlick, 415 F.2d 1248 (9th Cir. 1969) cert. denied, 396 U.S. 1012 (1970).

Similarly, that the remedies available in the subsequent action may be independent or different does not pre-

clude the application of res judicata. In Painters Dist. Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969), the court held that a decision by the National Labor Relations Board that a union had committed an unfair labor practice was res judicata in a subsequent court suit by the employer for damages, even though the NLRB had not had the power to award damages in the proceeding before it. The court said:

"It is long-settled that a finding by the Board of an unfair practice is not a condition precedent to a civil suit for damages and that the two remedies are independent of each other. But the matter of whether the two remedies may proceed contemporaneously...does not deny to a court power to apply principles of res judicata to previously litigated facts if the remedies proceed in tandem."

416 F.2d at 1085 (citations omitted).

The decision of this Court in Taylor v. N.Y.C. Transit Authority, 433 F.2d 665 (2d Cir. 1970), an action brought under 42 U.S.C. §1983, is, we submit, dispositive of the issues plaintiff raises concerning the applicability of res judicata to determinations of state tribunals, both judicial and administrative.

The plaintiff in Taylor had been discharged by the Transit Authority after a departmental hearing. He appealed this dismissal to the Civil Service Commission which denied the appeal. Thereafter, in an Article 78

proceeding initiated by plaintiff, the state courts concluded that the Civil Service Commission's determination was not "arbitrary," that plaintiff had elected his remedy under New York law by appealing to the Commission, and that plaintiff's claim of a denial of due process was barred by the statute of limitations.

Plaintiff then brought an action in federal district court seeking relief under §1983 on the ground that he had been denied due process by the Civil Service Commission. This Court, affirming the decision below, held that the action of the state court in dismissing the Article 78 proceeding on the ground of lack of jurisdiction and/or the lapsing of the statute of limitations constituted a final determination on the merits of the claim and was res judicata as to the federal claim.*

Further, having found that the Civil Service Commission had afforded Taylor "procedural due process and an opportunity to raise his constitutional objection," this

* Other courts, applying the same traditional principles of res judicata, have also reached this result in cases arising under §§1981, 1983 and 1985 when there has been a prior state proceeding. See Johnson v. Department of Water and Power of the City of Los Angeles, 450 F.2d 294 (9th Cir. 1971), cert. denied, 405 U.S. 1072 (1972); Frazier v. East Baton Rouge Parish School Board, 363 F.2d 861 (5th Cir. 1966); Jenson v. Olsen, 353 F.2d 825 (8th Cir. 1965); Scasserra v. Pennsylvania State Civil Service Commission, 363 F. Supp. 510 (W.D. Pa. 1973), aff'd., 491 F.2d 751 (3d Cir. 1974).

Court held that finality should be afforded to the administrative determination and that res judicata effect could properly attach thereto. 433 F.2d at 671.

Similarly, Roode v. Michaelian, 373 F. Supp. 53 (S.D.N.Y. 1974), was an action under §1983 in which a college professor alleged that her teaching contract had not been renewed because of her union activities. Previously, a charge filed with the Public Employment Relations Board had been sustained, but the Board's order had been denied enforcement in the New York Supreme Court because the order lacked sufficient support in the record. The federal district court dismissed the §1983 action on the ground that the state court's finding of insufficient evidence was res judicata in the federal proceeding:

"Having once had her day in court, plaintiff is not entitled to relitigate the factual issue determined against her before the Hearing Examiner and in the Article 78 proceeding. Plaintiff's remedy, if any, is by way of appeal in the state courts, and not by a trial de novo here."

373 F. Supp. at 56 (citations omitted).

In the present case, plaintiff has clearly had her day in court. Not only did she obtain on-the-merits adjudications by two state administrative agencies, both of which are specialized, expert, and particularly experienced in re-

solving claims of employment discrimination of the kind advanced, but also, represented by counsel, she has had an on-the-merits consideration of her claim by five Justices of New York's intermediate appellate court.

There can be no dispute that the State Division, the Appeal Board, and the Appellate Division had full adjudicatory power to determine the merits of plaintiff's charge of discrimination. And the exercise of this power to reach a final administrative and judicial determination adverse to plaintiff is, we submit, entitled to full respect in this or any other forum in which plaintiff might attempt to relitigate the same claim.

There are, we submit, no cases cited in the briefs filed on plaintiff's behalf which compel a departure from basic res judicata principles in a §1981 action when, as is the situation here, the claim asserted has been adjudicated to conclusion before fully competent administrative and judicial tribunals.

In Wageed v. Schenuit Industries, Inc., 406 F. Supp. 217 (D. Md. 1975), no state judicial determination had been sought or obtained. Plaintiff, claiming that the defendant employer had discriminated against him because of his race, instituted suit under §1981 while a complaint making the same charge was pending before the Maryland Commission on Human

Relations. The district court held the case sub curia pending the decision of the Commission, which ultimately found that the employer had not engaged in discriminatory conduct. The plaintiff took no appeal, although appellate review was available to him under Maryland law. The court, basing its decision almost completely on the rationale developed in cases arising under Title VII (42 U.S.C. §2000e et seq.), and without consideration of the cases applying res judicata in actions arising under §1983, denied res judicata effect to the state administrative decision.

In Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975), defendant contended that plaintiff's claim of employment discrimination under 42 U.S.C §1981 was barred on res judicata grounds by prior decisions of the Connecticut Commission on Human Rights and Opportunities and the Court of Common Pleas.

In rejecting defendant's contention, the district court specifically refrained from deciding "[w]hether employment discrimination proceedings in these state forums can ever bar relitigation in federal court of a discrimination claim under §1981" 392 F. Supp. at 94. Moreover, the court suggested that different factors may be involved when the res judicata issue arises under §1981 rather than

under Title VII. 392 F. Supp. at 94-95 n.6.*

The bases for the court's conclusion in Hollander makes that decision inapplicable to the present case. Indeed, in marked contrast to the situation here, the Hollander court found that under the applicable state procedures an investigator had "unilaterally determined" that plaintiff's charges lacked evidentiary support and dismissed them. Moreover, the court noted, "[n]o hearing was conducted and the plaintiff was not otherwise given an opportunity to argue his version of the facts." 392 F. Supp. at 95 (emphasis added). Further, the action taken by the Court of Common Pleas - its sustaining a "plea of abatement" based upon untimely and improper service of the petition upon defendant - was not, so the district court concluded, "a decision on the merits and thus does not constitute a bar to further litigation." 392 F. Supp. at 95.

Unlike the plaintiff in Hollander, plaintiff Mitchell had the opportunity to adduce evidence and argue her version of the facts at each stage of the state proceedings. And those proceedings culminated in an on-the-merits court determination. Thus, the standards for application of res judicata are clearly present in the instant case.

* We discuss these factors more fully at pp. 43-45, infra.

II

THE APPLICATION OF RES JUDICATA IN
THIS CASE IS CONSISTENT WITH FEDERAL
POLICY AND WOULD SERVE THE INTERESTS
OF JUDICIAL ECONOMY.

Neither plaintiff nor the EEOC as amicus challenges the fundamental proposition upon which we rely and upon which the District Court's determination rests -- that a litigant who has had the opportunity to adduce evidence, to argue his or her version of the facts, and to seek court review of any adverse findings is barred by res judicata from relitigating a claim already adjudicated.

While the important policy bases for the doctrine of res judicata are not disputed, both plaintiff and the EEOC assert that application of this traditional doctrine would be improper in the present case.

Three principal reasons are advanced in support of this assertion. First, it is contended that the District Court's decision is contrary to the policy said to support the pursuit of race discrimination claims in several forums and to favor the federal as opposed to state adjudication of such claims.* Second, it is argued that reversal of the decision below is required by an alleged congressional pre-

* See Brief for Appellant at 7-10, 22-24; Brief of United States Equal Employment Opportunity Commission as Amicus Curiae at 5-9.

ference for the resolution of discrimination claims via federal administrative conciliation and by general principles favoring judicial economy.* Third, plaintiff claims that application of res judicata would be inequitable in the circumstances of this case.**

We consider these reasons, none of which has merit, below.

A. No Federal Policy Compels the Relitigation of Plaintiff's Claim or the Resolution of the Factual Issues Raised Thereby In a Federal Forum.

Arguing that the resort to state proceedings does not bar a subsequent suit under Title VII, plaintiff and the EEOC contend that the same result should obtain in this action under 42 U.S.C. §1981.

First, it should be noted that plaintiff and amicus cite no case in which an on-the-merits state judicial determination of an employment discrimination claim has been denied res judicata effect -- even under Title VII. Both Batiste v. Furnco Construction Corp., 503 F.2d 447 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975), and Ferrell v. American Express Co., 8 FEP Cases 521 (E.D.N.Y. 1974) (not officially reported), involved state administrative determinations. In Voutsis v.

* See Brief for Appellant at 19-22.

** See Brief for Appellant at 10-19.

Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972), the claimed basis for res judicata was not a judicial determination, nor even a final on-the-merits administrative determination, but rather was only a voluntary settlement agreement so vague as to have proven unenforceable. This Court held that "no settlement has been effectuated," and thus that plaintiff was not barred on the basis of state proceedings which, notwithstanding lengthy delay, had accomplished no final determination of her claim. 452 F.2d at 893-894.

Similarly, in Batiste the plaintiffs, having received a favorable determination on their charges of racial discrimination in employment from the Illinois Fair Employment Practices Commission, nonetheless filed charges with the EEOC and brought suit under Title VII on the same grounds. The defendant had appealed the determination of the Illinois Commission to the appropriate state court, and that appeal was still pending when the Title VII action reached the district court and later the Court of Appeals (503 F.2d at 449). Thus the state procedure had not finally resolved the questions raised under either state or federal law.

Assuming arguendo, however, the correctness of plaintiff's assertion regarding the non-binding effect of prior state proceedings in a Title VII context* and the

* There are, of course, decisions to the contrary. See Toolles v. Kellogg Co., 336 F. Supp. 14, 17 (D. Neb. 1972); Marlowe v. General Motors Corp., 4 FEP Cases 1160, 1161-1162 (E.D. Mich. 1972) (not officially reported).

force of this Court's statement in Voutsis (that "res judicata and collateral estoppel do not bar appellant as a matter of law," 452 F.2d at 894*), the essential fact is, of course, that the present case is not a Title VII case.

Whatever the appropriate rule may be in Title VII cases, we believe that different considerations apply in actions under §1981.

One major ingredient of the Title VII statutory scheme -- an ingredient with no counterpart in §1981 -- is the policy requiring deferral of employment discrimination charges in the first instance to state agencies.

* The authorities cited in support of this proposition were, it should be noted, cases in which the issue in the earlier proceeding had not been the same as the issue in the Title VII action. It would seem likely that the Court did not mean to imply that res judicata could have no application in Title VII cases generally. Otherwise, even a federal judicial decision in a Title VII case would not preclude a plaintiff from bringing additional and identical Title VII actions. Further, the reasons stated by Voutsis for permitting the district court to assume jurisdiction despite the prior state proceedings (e.g., that the statutory scheme contemplated a resort to the federal remedy "if the state machinery has proved inadequate," and that the federal Title VII remedy was designed to be available "after the state remedy has been tried without producing speedy results," 452 F.2d at 893-894), support our claim that a prompt and final state determination should be dispositive. In the present case, and unlike Voutsis, the state adjudicatory process -- both administrative and judicial -- produced a speedy, definitive, on-the-merits result. And there are no Voutsis-like reasons for denying that adjudication full res judicata effect.

Under Title VII, no charge of discrimination may be filed with the EEOC unless it is first filed with the appropriate state or local agency. See Section 706(c), 42 U.S.C. §2000e-5(c). Indeed, the Commission is required, before taking any action with respect to a charge, to notify or "defer" to the appropriate state agency and afford it a reasonable time to remedy the unlawful practice alleged. See Section 706(d), 42 U.S.C. §2000e-5(d). Since no federal lawsuit may be commenced under Title VII unless a charge has been filed with the EEOC, the allegations of Title VII plaintiffs are always initially subject to state agency consideration -- whether or not such plaintiffs affirmatively desire such consideration.

If, given this Title VII statutory policy of deferral, the decisions of state administrative agencies were accorded res judicata effect, individuals seeking to redress alleged acts of employment discrimination would be forever barred from litigating their claims in federal court.

Thus, as Judge Metzner pointed out:

"It would be anomalous to argue that the very state proceeding that is required by Title VII bars the contemplated federal remedy under Title VII." 418 F. Supp. at 463, 94a.

As the District Court's opinion suggests, however, no such policy of deferral applies under 42 U.S.C. §1981.

Thus, plaintiff Mitchell was not required, as a pre-condition to the commencement of this action, to file a complaint of discrimination with the New York State Division of Human Rights. She was not required to prosecute an appeal to the Human Rights Appeal Board. And she was certainly not required to retain counsel and seek an on-the-merits adjudication of her claim before the Appellate Division.* Having voluntarily initiated and pursued these proceedings to their eventual conclusion, and having had, during the course of those proceedings, a fair and adequate opportunity to litigate all the issues raised here, to argue her version of the facts, and to seek court review of adverse findings, plaintiff should not, we submit, be permitted relitigation in this forum.

We do not, of course, dispute the point -- a point made clear by Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), and Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1974) -- that §1981 is, as Judge Metzner put it, "a separate and independent federal remedy...." 418 F. Supp. at 463, 94a. The support plaintiff derives from this principle and the cases in which it has been enunciated is, however, seriously misplaced.

* It should be noted that, even prior to the time she sought relief in the New York State courts, Ms. Mitchell (on February 27, 1974) filed a charge with the EEOC, thus setting in motion the procedures necessary for commencement of a Title VII action -- a course she evidently decided not to pursue.

First, it is one thing to say, as was said in Johnson and Gresham, that a litigant who has not pursued Title VII remedies is free to bring an action under §1981. It is, however, quite another matter to contend, as plaintiff contends, that a litigant who has pursued state remedies to an on-the-merits judicial conclusion should be immune from the principles of res judicata.

Moreover, the District Court's decision does not, as plaintiff urges, run counter to the Johnson and Gresham principles respecting the separateness and independence of Title VII and 42 U.S.C. §1981. Nor does that decision preempt any rights under either statute.

To the contrary, it is precisely because of such independence and separateness that application of res judicata is appropriate in the instant case -- and that the cases decided under Title VII, pursuant to which the potential federal court plaintiff must initially seek state or local relief, are inapposite.

As Gresham makes clear, the rationale for the independence of Title VII and §1981 is that the former "does not cover the entire subject matter of . . ." the latter. According to this Court, Title VII "was intended to buttress and supplement §1981 in a specific area rather than to serve as a substitute for §1981 itself." 501 F.2d at 691.

As the District Court concluded, however, and as both plaintiff and the EEOC ignore, the protection against discrimination afforded by the New York State Human Rights Law is broader than that afforded by §1981. See Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y.2d 371, 362 N.Y.S. 2d 139 (1974); State Division of Human Rights v. Kilian Manufacturing Corp., 35 N.Y.2d 201, (1974), appeal dismissed, 420 U.S. 915 (1975); 35a. Thus, application of res judicata will not preempt any of plaintiff's rights for the simple, but nonetheless compelling reason that at least all such rights were the subject of the state administrative and judicial proceedings.

Plaintiff also errs in saying that the District Court decision would destroy the independence of Title VII and §1981 by making access to §1981 attendant upon proceedings designed to be utilized under Title VII. (Brief for Appellant at 7). This contention misconstrues both the holding of the District Court and the position we assert. Plaintiff could have sued under §1981 at any time without resort to the procedures of the State Division or the EEOC. And it is her decision not to do so, but rather to pursue her state remedy to a final judicial conclusion, that may and should bar the present suit.

There is, furthermore, no basis for plaintiff's

assumption that an aggrieved individual will resort to a state anti-discrimination agency only "as a necessary expedient to insure . . . some action" (Brief for Appellant at 21). Individuals may and regularly do file complaints with a state or local agency because that is the forum in which they wish to pursue their claims, and not because they have been forced in that direction by the deferral provisions of Title VII.

Indeed, such a state of affairs is substantiated by the actions of plaintiff Mitchell herself. Ms. Mitchell filed a complaint with the State Division on December 4, 1973 (14a), and did not file a charge with the EEOC until after the adverse determination of the state agency (17a, 50a). Moreover, plaintiff never pursued the procedures available to her under Title VII even following issuance of the EEOC's "no reasonable cause" determination. While that determination informed Ms. Mitchell that she could proceed under Title VII by filing an action in federal court within 90 days (51a), plaintiff chose not to do so. Instead, having taken her claim through the administrative and judicial processes of the state, and the administrative processes of the EEOC, she then (some nine months after the EEOC dismissal) brought this action under §1981. There is, thus, no substance to plaintiff's claim that affirmance would inhibit the pursuit of Title VII remedies, formal or informal.

Plaintiff also misconstrues the meaning of the cases suggesting that the federal remedies provided by the post Civil War Civil Rights Acts, of which §1981 is a part, were designed to "supplement" state remedies.

The objectives which §§1981-1986 were designed to serve were described by the Supreme Court in Monroe v. Pape, 365 U.S. 167 (1961), (a case arising under §1983) as follows:

"First, it might, of course, override certain kinds of state laws.

...

"Second, it provided a remedy where state law was inadequate.

...

"But the purposes were much broader. The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."

365 U.S. at 173, 174 (emphasis in original).

The rationale for the third of these objectives was analyzed in greater detail in Alberda v. Noell, 322 F. Supp. 1379 (E.D. Mich. 1971), where the court said:

"In the enactment of the Civil Rights Act, 42 U.S.C. 1981, et seq., Congress was not concerned with the possibility that a state or state agency might adopt a statute or regulation arguably infringing some federally guaranteed right. It was concerned about the problems which arise when state judges or other

officials ignore the Supremacy Clause. State courts, when supplemented by review in the Supreme Court of the United States, are adequate and competent to resolve alleged inconsistencies between state and federal law. The Act was enacted to provide a remedy only where one either did not exist or for some reason an existing remedy was not enforced or otherwise was insufficient."

322 F. Supp. at 1383 (emphasis added; citations omitted).

It is in this context that the cases describing civil rights provisions such as §1981 as "supplementary" to state law must, we submit, be understood.

In McNeese v. Board of Education, 373 U.S. 668 (1963), a case relied upon by plaintiff (Brief for Appellant at 11), the issue was not the res judicata effect of a state proceeding, but whether relief under 42 U.S.C. §1983 might be defeated when relief was not first sought under state law. The Court's holding -- that the assertion of the federal claim in the federal court need not await an attempt to vindicate the same claim in a state court -- rested at least in part upon its doubt that the state had not provided sufficient protection for the federal rights involved. 373 U.S. at 674-676.

Here, however, as we have earlier noted and as the District Court found, the state law affords greater protection than federal law and (as we discuss more fully below in Point III) the state remedy was clearly adequate in prac-

tice as well as theory.

Thus, the characterization of the Civil Rights Acts as "supplementary" of state law in no way resolves the res judicata question. Where, as here, the protection which has been sought under state law is at least as broad as, if not broader than, the protection afforded by federal law, and where the issues of fact relevant to the claims are identical, the need to "supplement" the state procedure simply does not exist. There is, therefore, no reason to deny application of the traditional principles of res judicata.

Furthermore, it is well established that the Civil Rights Acts were not intended to provide either a substitute for state appellate processes or an avenue for collateral attack upon final state judgments. In Coogan v. Cincinnati Bar Association, 431 F.2d 1209, (6th Cir. 1970), the court applied res judicata in a case brought under the Civil Rights Act in which plaintiff sought to challenge his disbarment by the Supreme Court of Ohio. As the court stated:

"The Civil Rights Act was not designed to be used, as a substitute for the right of appeal, or to collaterally attack a final judgment of the highest court of a state and relitigate the issues which it decided.

"The final judgment of the Supreme Court is conclusive and [plaintiff] is precluded by the doctrine of res judicata

from relitigating not only the issues which were actually involved in the disbarment proceeding, but also the issues which he might have presented."

431 F.2d at 1211 (citations omitted).

In other instances, also, federal courts have made clear that it is not the function of the Civil Rights Act to review valid state court judgments. Indeed this Court itself said in Lackawanna Police Benevolent Association v. Balen, 446 F.2d 52 (2d Cir. 1971), "[t]he Civil Rights Act, unlike federal habeas corpus, does not permit a second bite at the cherry." 446 F.2d at 53.*

Plaintiff's suggestion that a federal court is the only proper fact finder when federal rights are involved (Brief for Appellant at 23) is in direct conflict with the foregoing cases and the §1983 cases earlier cited (supra pp. 17-19) in which the federal courts have applied res judicata to the prior determinations of state tribunals. Particularly where, as here, the state proceeding was pursued to a final judicial determination, such prior determination is entitled to decisive weight.

Finally, the Supreme Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), does not assist

* See also Montagna v. O'Hager, 402 F. Supp. 178 (E.D.N.Y. 1975); Jenzura v. Belden, 281 F. Supp. 200 (N.D.N.Y. 1968).

plaintiff's cause. In refusing preclusionary effect to an arbitration award, the Court there emphasized the importance of having judges applying "the law of the land," rather than arbitrators applying "the law of the shop," decide the issues (there under Title VII) in dispute. 415 U.S. at 57. Plaintiff here has already had her judicial decision -- a unanimous decision of five appellate justices.

Moreover, Gardner-Denver suggests that even arbitral decisions may be "accorded such weight as the court deems appropriate" (415 U.S. at 60) -- ranging even to "great weight" where the arbitrator possessed "special competence" with respect to the issue of discrimination, and "especially" where "the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." 415 U.S. at 60 n. 21. Clearly, the state authorities that addressed themselves to the issues raised by plaintiff's claim possessed the requisite "special competence." Indeed, the State Division of Human Rights and the State Human Rights Appeal Board were created for the very purpose of resolving issues of discrimination of the kind plaintiff tenders. And the conclusion that they decided such issues on an adequate record is compelled by the Appellate Division's unanimous affirmance.

In sum, affirmance of the decision below will not deprive plaintiff Mitchell of the protections afforded by

federal law. Nor will such affirmance affect the manner in which the doctrine of res judicata may or should be applied in Title VII cases. Further, the District Court's decision does no violence to the separateness and independence of Title VII and 42 U.S.C. §1981. Refusal to give binding effect to the state administrative and judicial determination would, however, conflict with the long line of cases applying traditional res judicata principles in actions under the Civil Rights Acts, and would in addition subject NBC to needless harassment and considerable prejudice.

B. Application of Res Judicata Would Serve the Interests of Judicial Economy and in No Way Derogate The Title VII Policy of Conciliation

There is no question but that one of the most important results of the application of res judicata is, as the Supreme Court said in Utah Construction, the avoidance of "'needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end'..." 384 U.S. at 420. Thus it is difficult to understand plaintiff's contention that application of res judicata would conflict with the interests of judicial economy.* Res judicata is judicial economy.

Plaintiff speculates, however, that if res judicata

* Brief for Appellant at 19-22.

is applied in this case, future aggrieved individuals would file a §1981 suit as a defensive measure before proceeding under state law. It is this supposed "proliferation" of actions which presumably would be uneconomic.

Assuming arguendo that mere filing of a §1981 suit would bar the later application of res judicata and that a significant number of individuals might seek so to preserve a §1981 right, plaintiff overlooks the probability that many actions of this kind would be withdrawn when the underlying dispute was resolved by a state agency or the EEOC. Further, even if a measurable increase in the number of suits filed under §1981 might result, such potential increase should not be avoided by the dubious expedient of requiring needlessly repetitive judicial activity in cases such as this.

Plaintiff contends further that the application of res judicata in a §1981 case would conflict with the congressional policy which favors conciliation as a tool in discrimination cases. (Brief for Appellant at 19-22.)

In support of this contention, plaintiff relies on an excerpt from a lengthy paragraph in the Supreme Court opinion in Johnson v. Railway Express Agency, Inc. (Brief for Appellant at 20). It is clear from the entire paragraph, however, that the Court, recognizing that a §1981 action might have an adverse impact on Title VII procedures, nonethe-

less concluded that there was no federal policy or preference which would require judicial protection for the conciliation procedures of Title VII. The Court said, in full:

"We are satisfied, also, that Congress did not expect that a §1981 court action usually would be resorted to only upon completion of Title VII procedures and the Commission's efforts to obtain voluntary compliance. Conciliation and persuasion through the administrative process, to be sure, often constitute a desirable approach to settlement of disputes based on sensitive and emotional charges of invidious employment discrimination. We recognize, too, that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be. But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others, the reverse may be true. We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a §1981 action while an EEOC claim is pending." 421 U.S. at 454.

Thus the Court discussed and disposed of the contention plaintiff here advances. Congressional policy leaves to the claimant the choice of the route to follow; there is no statutorily prescribed priority.

In addition, plaintiff fails to point out that, pursuant to the prevailing congressional policy, conciliation by the EEOC was not, in any event, available to her.

By the very terms of Title VII, the EEOC may resort to conciliation when, after investigation, the Commission has determined that "there is reasonable cause to believe that the charge is true." Section 706(b), 42 U.S.C. §2000e-5(b). In this case, the EEOC made no such determination. On the contrary, it found no reasonable cause to believe that the charge filed by Ms. Mitchell was true (51a). Thus, in accordance with the congressional and statutory policy, the EEOC did not pursue conciliation efforts. The denial of res judicata effect to the state determination would in no way change that result. Thus, the application of res judicata in this action would by no means inhibit the EEOC from using the administrative tool of conciliation in an appropriate case.*

III

DURING THE COURSE OF THE STATE PROCEEDINGS, PLAINTIFF HAD, AND AVAILED HERSELF OF, A FULL AND FAIR OPPORTUNITY TO ADDUCE EVIDENCE, ARGUE HER VERSION OF THE FACTS, AND SEEK JUDICIAL REVIEW OF THE FINDINGS MADE AGAINST HER. THOSE PROCEEDINGS RESULTED IN A FINAL DETERMINATION ON THE MERITS WHICH IS ENTITLED TO RES JUDICATA EFFECT

Plaintiff and amicus EEOC contend that it would be in-

* It should be noted that the State Division is not as inhibited as the EEOC with respect to the point at which conciliation efforts may be undertaken. Section 297(3) of the N.Y. Human Rights Law empowers the Division to attempt conciliation at any time following the filing of the complaint.

equitable to apply res judicata because of the alleged inadequacy of the state procedures Ms. Mitchell initiated and pursued to a judicial conclusion.

The first -- and shortest -- answer to this contention is that the issue of alleged inadequacy or unfairness was raised and litigated in the state proceedings, and is, accordingly, also res judicata in this action.

In the petition filed by plaintiff's attorneys with the Appellate Division, the quality of the investigation conducted by the State Division was directly and specifically made the subject of attack (29a-30a ¶¶6-10). Moreover, plaintiff explicitly requested, inter alia, that the First Department remand for further investigation (31a), a request the Court had the power to grant and which would have been granted had it found "reasonable grounds" therefor. N.Y. Human Rights Law §298.

However, following its review of the record, which included a dissenting opinion in the Human Rights Appeal Board that had suggested a re-investigation (42a), and other documents challenging the State Division's procedures (36a-39a), the Appellate Division unanimously confirmed the administrative determination.

As this Court made clear in Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420

U.S. 976 (1975), where an issue, including an issue relating to the alleged unfairness or unconstitutionality of a state proceeding, has actually been raised in state court, the litigant has made his choice and may not relitigate the question. There is no reason why this principle should not be applied here.

While in Lombard the Court refused to apply res judicata so as to bar plaintiff's §1983 claim that he had been denied procedural due process when his employment was terminated by the defendant Board of Education, this issue had not been raised in the state proceedings for which preclusionary effect was sought. 502 F.2d at 635. Moreover, the Court suggested that application of the res judicata doctrine to foreclose litigation of a due process issue that could have been, but was not, litigated in the state forum, would force plaintiff to undertake what would be a futile attack on the administrative process. 502 F.2d at 636.

The Court made clear, however, that where an issue -- including a constitutional issue -- had actually been raised in the state court, it could not be raised again in a federal proceeding. A litigant may not, said the Court, "have two bites at the cherry." 502 F.2d at 636-637.

It is, moreover, especially inappropriate for amicus EEOC to join in the argument concerning the alleged inadequacy

of the State Division procedures. The State Division is, in the first place, a so-called "deferral agency" under Section 706(c) of Title VII, 42 U.S.C. §2000e-5(c) -- that is, an agency to which the EEOC, by statute and by its own regulations (EEOC Procedural Regulations, 29 CFR §1601.12), is required to forward discrimination complaints prior to Commission processing. And this "deferral" designation is conferred by the EEOC only if (in the EEOC's judgment) certain standards are met. See EEOC Procedural Regulations 29 CFR §1601.12(c), (e), (f), and (k). More significantly, perhaps, the EEOC -- in this very case -- relied upon the State Division's findings in reaching its own "no reasonable cause" determination (51a). Accordingly, the Commission should hardly be entitled now to claim that such findings were either in error or not properly made.

Assuming arguendo, however, that the question of the alleged inadequacy or unfairness of the state procedures may properly be considered on this appeal, examination of the record amply demonstrates that the prior proceedings afforded Ms. Mitchell a full opportunity to be heard and resulted in a fair and final determination on the merits -- a determination entitled to res judicata effect.

It is clear that, during the state proceedings, plaintiff Mitchell had and exercised the opportunity to adduce

evidence on her behalf, to argue her version of the facts, and to have judicial review of the factual findings made against her.

This being so, the fact that plaintiff, uninhibited by formal rules of evidence, was unable to persuade the State Division, the Appeal Board, and the Appellate Division that her claim was substantial enough to merit extended consideration makes no difference.* Res judicata should be invoked just as it would be invoked to bar relitigation of a claim previously adjudicated by a federal court on a motion under Rule 56 of the Federal Rules of Civil Procedure.

Further, plaintiff's contention that she was prejudiced by the absence of "discovery" procedures is without merit.

The powers of the State Division are plenary. Section 295.6(a) of the Human Rights Law authorizes the Division:

"To receive, investigate and pass upon complaints alleging violations of this article."

To carry out these responsibilities the Division is empowered, under Section 295.7:

"To hold hearings, to provide where appropriate for cross interrogatories, subpoena witnesses, compel their attendance,

* Indeed, and when it suits her purposes to do so, plaintiff extols the informal resolution of discrimination complaints. See Brief for Appellant at 20.

administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the division. The division may make rules as to the issuance of subpoenas which may be issued by the division at any stage of any investigation or proceeding before it.

"In any such investigation or hearing, the commissioner, or an officer duly designated by the commissioner to conduct such investigation or hearing, may confer immunity in accordance with the provisions of section 50.20 of the criminal procedure law." (emphasis added).

Pursuant to the provision quoted, the Division has promulgated a rule (discussed supra, p. 5n) providing for the issuance of subpoenas and subpoenas duces tecum, at any stage of an investigation or proceeding, at the instance of any party appearing without attorney.*

Thus, neither the State Division nor a complainant before it is, as plaintiff claims (Brief for Appellant at 11-12), "severely circumscribed" in discovering or marshalling evidence.

* See Rules of Practice and Procedure of the Division of Human Rights §465.10, 3 CCH Employment Practices Guide ¶26,085. New York State Division of Human Rights v. University of Rochester, App. Div. 2d _____, 386 N.Y.S. 2d 147 (4th Dept. 1976), upon which plaintiff relies (Brief for Appellant at 12 n. 8), dealt solely with the power of an attorney representing a complainant to issue a subpoena. The decision in no way impaired the efficacy of the Division rule, to which we refer, which entitles an unrepresented complainant to request the issuance of a Division subpoena at any stage of a proceeding.

We recognize, of course that during the course of the state proceedings there was no formal hearing. But this is not to say that there was not a full scale investigation and an on-the-merits determination of the charges made. The relevant documents were examined and considered, and the NBC employees who were involved in the decisions concerning plaintiff Mitchell were present and subject to questioning.

Moreover, the state procedure is to order a formal hearing only when there is probable cause to believe that discrimination occurred -- when, that is, investigation discloses that the claim of discrimination may have some merit. If the application of res judicata is limited to such cases, and denied in cases where no probable cause is found -- where, in effect, the expert state agency concludes that the claim is frivolous -- the anomalous result would be to sanction the relitigation of frivolous claims while barring those deemed of at least some merit.

Nor should the absence of a formal hearing deprive the state determination of its "on-the-merits" quality. That determination must be regarded, at the least, as the equivalent of a dismissal for failure to state a cause of action or a verdict based on the failure of or insufficient proof. In each of these situations, the resulting judgment is clearly "on the merits."

If the finding of "no probable cause" be viewed as a failure of proof, it makes no difference (aside from casting doubt upon her credibility) that plaintiff may now advance factual assertions that were not included in her State Division complaint (or, for that matter, in her EEOC charge). The allegation of factual details supportive of a claim, which were not developed in a prior proceeding, does not give rise to a new claim which may be heard in a subsequent proceeding. Liddell v. Smith, 345 F.2d 491 (7th Cir. 1965). Res judicata bars the relitigation not only of issues actually litigated, but also of issues which the parties had an adequate opportunity to or could have litigated. See, e.g., Morris v. Jones, supra.

Clearly, since all of plaintiff's assertions relate to events allegedly occurring prior to her termination, the issues raised thereby could have been and should have been litigated in the state proceedings initiated and carried to the Appellate Division. Indeed, if plaintiff's effort to relitigate receives judicial sanction on the basis of any new assertions included in her federal court complaint, the problems already attendant upon the availability of multiple forums in the employment discrimination area will be geometrically increased to the problems of the multiple use of multiple forums. Litigants, like the plaintiff, will be encouraged to assert new facts in all available

forums on a limitless number of occasions, though seeking all the while (as plaintiff Mitchell here seeks) to redress one and the same allegedly discriminatory discharge.

Similarly, if the State Division's finding of "no probable cause" be viewed as analogous to a dismissal for failure to state a cause of action, it should be given res judicata effect as a determination of the merits of the controversy.

In Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964), plaintiff alleged conspiracies under §§1981, 1983, and 1985-1988 which were similar to those which had been alleged in a prior federal suit. Although the earlier action had resulted in a dismissal for failure to state a cause of action, the court applied the doctrine of res judicata.

As the court said:

"[A] judgment entered on a motion to dismiss for failure to state a claim on which relief can be granted can support a defense of res judicata in a subsequent action. Judge Sanborn in Sylvan Beach, Inc., v. Koch, 8 Cir., 140 F.2d 852, 860, quoted from Freeman on Judgments, 5th Ed., Vol 2, §740 where it was stated that 'A judgment on the pleadings is on the merits if it determines the merits of the controversy as distinguished from the merits of the pleadings.'"

334 F.2d at 716.

Similarly, in Crawford v. Zeitler, 326 F.2d 119 (6th Cir. 1964), where plaintiff had sued under §§1982, 1983, and 1985, the court held that an earlier decision by

a federal district court dismissing the same complaint for failure to state a cause of action was res judicata.

Thus, the state administrative determination -- especially as merged into the state judicial determination -- was "on-the-merits" and is accordingly entitled to res judicata effect.

Furthermore, and contrary to plaintiff's assertion, the New York Appellate Courts apply an exacting standard when reviewing a State Division dismissal for "no probable cause." In Mayo v. Hopeman Lumber & Manufacturing Co., 33 App. Div. 2d 310, 307 N.Y.S. 2d 691 (4th Dept. 1970), the court, describing the appropriate test when no hearing is held, stated:

"It must be borne in mind that the Division, through its Director, received information concerning the complaint by holding the conference and by investigation, but there has been no hearing, and complainant has had no opportunity to present his case in a formal manner. For the Division to dismiss his complaint under such circumstances it must appear virtually that as a matter of law the complaint lacks merit." 33 App. Div. 2d at 313, 307 N.Y.S. 2d at 694-695 (emphasis added).*

* That the Appellate Division or the New York Court of Appeals may decline to resolve a controversy completely, but rather, and in appropriate cases, remand for further investigation or consideration, in no way derogates the quality or legal effect of such court's scrutiny of the record. The EEOC's suggestion to the contrary (Brief of Amicus Curiae at 3) is without merit. See also Burns v. Sabena Belgian Airlines, 42 App. Div. 2d 347, N.Y.S. 2d 958 (1st Dept. 1973) where the Court remanded the proceeding to the Division for further action when the complaint had been dismissed by the Division for "no probable cause" and the Appeal Board had evenly divided as to whether the Division had been arbitrary and capricious.

Finally, plaintiff Mitchell requests special consideration and argues that res judicata should not bar her claim because of the allegedly "unsettled state of the law" concerning the need to exhaust Title VII administrative remedies prior to bringing an action under §1981. (Brief for Appellant at 17-19). But the law which should have been of concern, at the time of the state proceedings, was not so unsettled as plaintiff would have the Court believe.

It is claimed that plaintiff's decision whether to proceed in the state court would have had to be based on the analysis of res judicata in Voutsis v. Union Carbide Corporation, supra, 452 F.2d 889 (2d Cir. 1974), a case which arose under Title VII. This misconceives the issue and overlooks completely the fact that Taylor v. N.Y.C. Transit Authority 433 F.2d 665 (2d Cir. 1970) and other cases to the same effect (supra, p. 18) had already been decided. These cases, arising under the companion provisions to §1981 in the Civil Rights Acts, were the guide posts available. And these cases made clear that res judicata was applicable to state judicial and administrative proceedings in federal civil rights actions brought under the long standing provisions of the early acts. Further, it should be noted that prior to August 26, 1974 the date upon which plaintiff's attorneys petitioned the Appellate Division, Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1974), had, in fact, been decided.

Assuming arguendo, however, that the question was unsettled, plaintiff's situation was not nearly the same as, or even similar to, that presented in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) on which plaintiff relies. (Brief for Appellant at 19, 25).

In England, submission of the controversy to the state court had come only after the invocation of federal jurisdiction. More importantly, state processes had been pursued not only at the direction of the federal court, but also in reliance upon a specific ruling of the Supreme Court which the plaintiffs not unreasonably believed required them to litigate in the state. Nothing even approximating such compulsion occurred in this case.

In conclusion, and even if the question of the alleged adequacy of the state proceedings is an issue properly before the Court, no inequity would result from according the state determination binding effect. All issues that plaintiff now raises were raised and resolved pursuant to a full and fair procedure. That procedure -- both administrative and judicial -- has produced a speedy, definitive, and on-the-merits adjudication. There is no reason to believe that §1981 was intended to do any more for plaintiff Mitchell than has already been done. And, there are, we believe, no reasons why such adjudication should not be given full res judicata effect.

CONCLUSION

For the reasons set forth above, we respectfully submit that the order of the District Court granting defendants' motion for dismissal of the complaint and for summary judgment should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Nina C. Augello being duly sworn, deposes and states :

I am not a party to the action, am over 18 years of age and reside at 39-62 48th Street
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On November 19, 1976 , I served the attached Brief for the Appellees by serving two copies upon the following attorney(s) at the address designated by him (them) for that purpose:

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Said service was made by depositing a true copy of the attached Two Copies of the Brief for Appellees

enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Nina C. Augello

Nina C. Augello

Sworn to before me this

19th day of NOVEMBER, 1976

Vitold J. de Stronie
Notary Public

VITOLD J. de STRONIE
Notary Public, State of New York
No. 41-4517529
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1977

